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Issue Date: 31 August 2005

CASE NOS.: 2004-LHC-01735, 2005-LHC-00001, 2005-LHC-00002, 2005-LHC-00003, 2005-LHC-00004

OWCP NOS.: 01-157896, 01-157734, 01-157898, 01-157899, 01-157900

In the Matter of

STEVEN M. VALLEE
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insurer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS[1]
Party-in-Interest

Appearances:

Marcia J. Cleveland, Topsham, Maine,
for the Claimant

Stephen Hessert, Esquire (Norman, Hanson & DeTroy),
Portland, Maine for the Employer/Self-Insured

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

[1] The Director, who is an interested party in view of the Employer's request for liability relief pursuant to the provisions of 33 U.S.C. § 908(f), did not appear at the hearing and has declined to participate in the proceedings before the Office of Administrative Law Judges. *See* Administrative Law Judge Exhibit 35 (letter dated January 14, 2005).

I. Statement of the Case

In these consolidated claims brought under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "LHWCA"), Steven M. Vallee (the "Claimant") seeks an award of workers' compensation benefits from his former employer, the Bath Iron Works Corporation ("BIW"), alleging that he is permanently disabled due to limitations imposed by a series of work-related injuries to his neck and back that he suffered while employed by BIW as a shipyard cleaner/laborer. The parties were unable to resolve the claims through informal proceedings before the Office of Workers' Compensation Programs ("OWCP"), and that office transferred the case to the Office of Administrative Law Judges ("OALJ") for a formal hearing pursuant to section 19(d) of the LHWCA. 33 U.S.C. § 919(d).

Pursuant to notice, a hearing was conducted in Portland, Maine on January 26, 2005, where all interested parties were afforded an opportunity to present evidence and argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made on behalf of BIW. The Claimant testified at the hearing, and documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-16 and BIW Exhibits ("EX") 1-74. Hearing Transcript ("TR") at 9-11. At the close of the hearing, the parties were granted leave to offer additional evidence and to file post-hearing briefs. TR 54. The post-hearing time frames were later extended, and the following additional items of evidence have now been offered and admitted into evidence:

Deposition of Stephen S. Grant (2/28/05)	CX 17 / EX 78
Deposition of Maria Mazorra, M.D. (3/18/05)	CX 18 / EX 79
Deposition of Melvyn E. Attfield, Ph.D. (3/24/05)	CX 19 / EX 75
Deposition of John Guernelli, M.D. (2/7/05)	CX 20 / EX 76[2]
Supplemental BIW Medical Records (253 pages)	EX 77

Both parties submitted briefs and the record is now closed. After careful analysis of the evidence contained in the record and the parties' arguments, I conclude that the Claimant is entitled to an award of compensation for periods of temporary total and permanent total disability plus interest on unpaid compensation and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. The Claims, Stipulations and Issues Presented

The claims are for a period of temporary total disability compensation from February 3, 2003 through April 28, 2003 and continuing permanent total disability compensation from April 16, 2004 forward based on multiple work-related back and neck injuries that the Claimant

[2] Both parties submitted the four post-hearing deposition transcripts. Thus, they are essentially joint exhibits although the Court has retained the exhibit numbers affixed by the parties.

sustained while working in BIW's shipyard. At the hearing, the parties stipulated that the claims arising from these injuries come within the coverage of the LHWCA. TR 14-15. The Claimant contends that the injuries that he suffered at BIW limit his ability to bend, twist and lift and prevent him from doing his usual job, thus leaving him totally disabled. Claimant's Brief at 1. BIW argues that the claim for permanent total disability benefits should be denied because the Claimant voluntarily resigned in April of 2004 despite the availability of suitable work that accommodated his appropriate limitations (*i.e.*, those which restrict his lifting and carrying but not bending and twisting) and because any ongoing incapacity for employment is due to the Claimant's non-occupational emotional problems. BIW Brief at 16. BIW offered no defense to the claim for the closed period of temporary total disability compensation in 2003. Therefore, the primary issue presented for adjudication is whether the Claimant is permanently and totally disabled because his work-related injuries cause limitations which prevent him from continuing employment at BIW or whether his decision to resign from BIW and his inability to work are based on intervening factors that are unrelated to the workplace injuries that he sustained at BIW. BIW also raises issues as to whether it is liable under the LHWCA for payment of the Claimant's treatment with Dr. Guernelli and whether it is entitled to liability relief from the Special Fund in the event that the Claimant is found to be permanently and totally disabled.

III. Findings of Fact and Conclusions of Law

A. Background

The Claimant, a 39-year-old high school graduate, was hired by BIW as a laborer/helper on December 7, 1987. TR 22; EX 40. Over the next 16 years and until his resignation in April of 2004, the Claimant worked at BIW as a cleaner. This job required him to regularly twist and bend in order to gain access to confined areas aboard ships where he performed cleaning work to prepare the areas for painting. TR 24-26, 30-33, 37-38. It is undisputed that the Claimant suffered a series of work-related injuries at BIW and has a long history of emotional problems, substance abuse and family conflict. Regarding the work-related injuries which are the basis of his claim for permanent total disability benefits, the record shows that the Claimant notified BIW of the following incidents: (1) a lower back strain on March 17, 1989, reportedly sustained while picking up trash (EX 1, 2); (2) a December 10, 1992 back strain, reportedly sustained when he attempted to lift a five-gallon can of "non-skid" paint (EX 5-7); (3) a third back strain reportedly sustained on October 18, 1994 (EX 11, 12); (4) another back strain reportedly sustained on November 14, 1997 while working in tanks (EX 17-19); (5) an episode of back pain on September 24, 1999 reportedly sustained while performing grinding work (EX 24, 25 at 1); and (6) a neck injury reportedly sustained on June 9, 2002 while crawling through tanks (EX 32, 33).

Regarding the most recent reported injury to his neck, the Claimant testified that he had a history of problems with stiffness in his neck that became substantially worse after an incident at work on June 9, 2002. TR 44. He said that he worked that day on an overtime assignment which involved paint repair work inside of tanks which were some of the tightest spaces on the ship. TR 24-25. After completing this work and emerging from the tanks, he told his foreman that he thought he pulled something in his neck. TR 24-25. The following day, the Claimant's neck pain increased, and he went to see Wayne McFarland, a nurse practitioner in BIW's First

Aid Department (a/k/a "Employee Health"), who sent him back to work after administering some basic strength tests. TR 26.

The Claimant recalled that his first back injury in 1989 occurred while he was picking up trash, but he was unable to remember the details of the back injuries reported in 1992, 1994, 1997 and 1999. TR 22-24. However, he did testify that he has experienced flare-ups of low back symptoms over the years, some of which he reported to the First Aid Department. TR 43-44. In addition, the Claimant said that he missed time from work between February 3, 2003 and April 28, 2003 because of an episode of low back pain that he thought was precipitated when he bent over to pick up a folder off of a couch. TR 27. The Claimant said that after returning to BIW in April of 2003, he had tolerable low back pain and was able to work until the early part of 2004 when the discomfort increased, prompting him to seek medical attention and eventually leave work. TR 27-28, 37.

B. The Claimant's Medical Care and Work Restrictions

The parties introduced a large volume of medical records which cover the Claimant's medical care throughout the course of his employment at BIW. In view of the relatively limited scope of the issues presented, the discussion of the medical evidence will be limited to the records and medical opinions that are contemporaneous with the two periods of disability covered by the claims and the records and opinions relating to the Claimant's emotional condition.

BIW medical records corroborate the Claimant's account that he was seen in the First Aid Department following the June 9, 2002 incident when he reported neck pain after working in tanks. CX 14. He was initially diagnosed with cervical radiculopathy and placed on work limitations (no overhead work, no confined spaces and no lifting in excess of 25 pounds) after a MRI study disclosed foraminal narrowing at several cervical levels and a disc herniation or bulging at C5-6. *Id.* at 179-192. The BIW First Aid Office classified the injury as work-related. *Id.* at 194.

BIW referred the Claimant to Rajiv D. Desai, M.D. for a neurosurgical evaluation on September 3, 2002 at which time the Claimant reported that his symptoms had markedly improved over the preceding month. CX 9 at 135. Dr. Desai noted that there was a discrepancy in the report of the MRI study, and he clarified that the Claimant's cervical diagnosis is left C6-7 radiculopathy secondary to C6-7 disc herniation with symptoms largely resolved. *Id.* at 136. Dr. Desai recommended against any surgical intervention or other aggressive treatment in favor of a plan to continue the Claimant's work limitations for another two months after which his activity level would be gradually increased. *Id.* The Claimant returned to Dr. Desai on November 6, 2002, reporting no change in his condition, and Dr. Desai recommended a trial of epidural steroid injections. *Id.* at 139. He also continued the Claimant's work limitations. *Id.* at 140. Dr. Desai did not see the Claimant again until March 19, 2003 when the Claimant reported no relief from the steroid injections, and he decided to refer the Claimant to a physiatrist in his practice, John Pier, M.D. *Id.* at 143.

The Claimant's medical records show that he was seen by his primary care doctor, Michael A. Bergeron, M.D. on February 3, 2003 for complaints of back pain which Dr. Bergeron found to be work-related and incapacitating. CX 6 at 75-76. A MRI study on February 6, 2003 showed degenerative disc changes at L5-S1 with a left-sided parasagittal disc herniation affecting the nerve roots. *Id.* at 77. Dr. Bergeron's office notes indicate that he referred the Claimant to a neurosurgeon, Patricio H. Mujica, M.D., for evaluation of his back, and he stated in a note dated January 7, 2004 that the Claimant was out of work from February 2, 2003 to April 28, 2003 "due to the fact that he remained symptomatic and full evaluation by neurosurgeon had not yet been completed." *Id.* at 80-81, 83.

Dr. Mujica saw the Claimant on April 22, 2003 at Dr. Bergeron's request. CX 11 at 156. Dr. Mujica reported that the Claimant related a history of initially hurting his back in 1989 after doing repetitive lifting and bending at BIW, followed by chronic, intermittent low back and left leg pain with the most recent episode occurring in early February of 2003 when he stood up from a sofa at home and felt intense pain. *Id.* Dr. Mujica reviewed x-ray and MRI studies of the Claimant's lumbar spine which revealed chronic disc disease and a small subligamentous disc herniation at the L5-S1 level. Based on the size of the disc herniation and the current absence of intractable symptoms, Dr. Mujica recommended a course of physical therapy and low back conditioning in lieu of surgery. *Id.* at 157. He stated that he told the Claimant that based on the history provided, it was his opinion that the Claimant had chronic, recurrent problems since he initially injured his back at work in 1989 and that the episode starting in February when he got up from a couch at home "aggravated a pre-existing condition." *Id.* Dr. Mujica also wrote in his report that he would recommend permanent work restrictions of no lifting more than 50 pounds and avoidance of repetitive bending, stooping or twisting his back, but the Claimant asked him not to put any restrictions on his work. *Id.* Finally, Dr. Mujica stated that the Claimant seemed upset that the doctor could not "fix" his back problem and that he suggested that the Claimant get a second neurological opinion. *Id.*

Dr. Pier, the physiatrist who is a member of the same medical group as Drs. Desai and Mujica, saw the Claimant on April 30, 2003 to evaluate his complaints of cervical discomfort. CX 12. At the time of his examination, the Claimant told Dr. Pier that he had returned to work at BIW with restrictions. *Id.* at 159. However, a BIW First Aid Department note dated April 28, 2003 indicates that the Claimant was returned to work without limits. CX 14 at 221. In either case, Dr. Pier's impression was C7 radicular symptoms, and he somewhat cautiously recommended surgery, stating that "[i]t is reasonable to consider surgery but certainly there are no guarantees." *Id.* at 160. Dr. Pier sent a State of Maine Workers' Compensation Board Practitioner's Report ("M-1") to BIW, limiting the Claimant to moderate (30 minutes in an hour) overhead and climbing work, lifting up to 40 pounds occasionally (21 minutes in an hour) and up to 20 pounds frequently (up to 42 minutes in an hour) and carrying up to 80 pounds occasionally and up to 25 pounds frequently. EX 77 at 404. Dr. Pier also stated that the Claimant should avoid working in confined spaces which require his head to be rotated or excessively flexed or extended. *Id.* He did not place any time limit on these recommended work restrictions or otherwise indicate that the restrictions were temporary. Dr. Pier stated that he had reviewed his impression and recommendations with Dr. Desai who would follow-up if necessary. CX 12 at 160. The Claimant returned to Dr. Desai on July 3, 2003 at which time Dr. Desai advised that he could "continue with work as recommended by Dr. Pier." CX 9 at 145.

There is no indication in the record that the Claimant pursued the surgical option during the remainder of 2003. As of December 30, 2003, the Claimant reported to his treating psychiatrist that he was doing well, had been able to work steadily and had just completed three months work in Virginia. EX 52 at 176.

The next entry of significance in the medical records is Dr. Bergeron's January 28, 2004 progress note reporting that the Claimant was seen with an acute one-day onset of low back pain radiating into his left thigh. CX 6 at 84. Dr. Bergeron's assessment was low back pain with recurrent radiculopathy and a depressed right knee reflex that he said was suspicious for recurrent disc herniation. *Id.* Dr. Bergeron further stated that he was unsure whether this most recent episode was related to either the Claimant's work or his chronic back problems, and he completed a M-1 in which he restricted the Claimant to "sedentary" work with no lifting, bending, twisting, crawling, ladders or climbing. *Id.* at 85. The Claimant reported back to BIW on February 4, 2004 at which time he was returned to work with the limits recommended by Dr. Bergeron. EX 77 at 349.

Dr. Bergeron referred the Claimant to William F. D'Angelo, M.D., another neurosurgeon who is a member of the same practice as Drs. Desai and Pier. Dr. D'Angelo examined the Claimant on March 1, 2004 and stated in his report of that date that an MRI in February of 2004 showed a moderate left L5-S1 disc rupture with some S1 root compromise from which the Claimant seemed to be recovering after being out of work for several weeks. CX 7 at 90. Dr. D'Angelo added that the Claimant's apparent recovery was surprising given the nature of the disc rupture and the Claimant's work, and he wrote that the Claimant could return to work with a four month restriction of lifting no more than 40 pounds. *Id.* Dr. D'Angelo also filed a report in which he stated that he considered the Claimant's problems to be work-related. *Id.* at 91. BIW accepted Dr. D'Angelo's lifting limitation and returned the Claimant to modified duty with a restriction of no lifting over 40 pounds for a four-week period beginning March 4, 2004. CX 14 at 224.

Two days after his appointment with Dr. D'Angelo, the Claimant returned to Dr. Bergeron, reportedly "very frustrated with his pain and problems with work." CX 6 at 88. The Claimant explained that he felt that the limitations from Dr. D'Angelo were "bogus" because Dr. D'Angelo would not listen to him:

> [A]t first he had given me lifting of 60 pounds, and I asked Dr. D'Angelo do you know what I do for work, and can I tell you what I do for work, and he – and I explained a little bit, I believe, and he said how about no lifting of 40 pounds. And I had at that point had enough of him because of this bull that we had been through over the past half hour or so and I said okay, and there is more to it but I left. And then I went to see Dr. Bergeron for the follow-up, and I explained to him what happened. It was not fun being at Dr. D'Angelo's office hearing about his car insurance.

TR 35-36. Dr. Bergeron stated in his progress note that the Claimant told him that Dr. D'Angelo had recommended physical therapy, which he declined, and that his depression had been getting

worse. *Id.* Dr. Bergeron suggested that the Claimant see Dr. Guernelli or another physician at Medical Rehabilitation Associates "for other medical treatment and pain control." *Id.* Dr. Bergeron further recommended that the Claimant discuss his depression with his psychiatrist, and he stated that he was continuing the Claimant's prescription for Vicodin and the "work restrictions as outlined by Dr. D'Angelo." *Id.*[3]

The Claimant was seen by G.F. Guernelli, M.D., a physiatrist, on April 2, 2004. CX 13. Based on his examination and review of the medical records, Dr. Guernelli's impression was (1) chronic intermittent axial low back pain likely discogenic with some referred pain into the left buttock and thigh, (2) work-related issues, (3) cigarette smoking, and (4) anxiety. *Id.* at 162. He recommended a spine rehabilitation program in addition to regular exercise, and he stated, "I agree with the work restrictions provided by Dr. D'Angelo which I was told were a lifting max of 40 pounds." *Id.* However, in a State of Maine Workers' Compensation Board Practitioner's Report ("M-1"), Dr. Guernelli stated that the Claimant "should be restricted to no lifting or carrying more than 10 pounds on a regular basis and 20 pounds occasionally with no repetitive bending or twisting at the waist and no prolonged sitting, standing or walking for more than 1 to 2 hours at a time without a change in position or rest period." *Id.* at 164.

Dr. Guernelli testified at a post-hearing deposition that he is board-certified in physical medicine and rehabilitation, pain management and electrodiagnostic medicine. CX 20 at 3. Regarding the statement in his April 2, 2004 report (CX 13 at 162) that he agreed with the restrictions outlined by Dr. D'Angelo, Dr. Guernelli stated,

> I should have elaborated a little on that. I think what I meant to say was – was that Dr. D'Angelo's lifting restrictions indicated a maximum of 40 pounds. However, given the fact that he was being treated for ongoing, intermittent back pain, that his restrictions should probably be refined a little bit in order to prevent him from further injury.

Id. at 5. Thus, he testified that his M-1 (CX 13 at 164) contains the better description of the specific restrictions that he recommended for the Claimant. *Id.* Dr. Guernelli further explained that his physical examination of the Claimant was "pretty much normal" and that there was no indication from his examination that either the Claimant's work at BIW or his previous medical treatment were inappropriate. *Id.* at 12-13. He added that the additional restrictions that he recommended were based on the Claimant's history and his clinical impression that the Claimant suffered from chronic, intermittent disc pain, and he said that these restrictions represented his standard approach in cases of patients with disc pain who do manual labor. *Id.* at 13. While he would not directly disagree with Dr. D'Angelo's recommended restriction, he did allow that a 40 pound limit is "a little generous" and said that it is his feeling that the Claimant's work restrictions should have been a little greater, at least until he had received some treatment and shown signs of improvement. *Id.* at 15. Dr. Guernelli saw the Claimant a second time on June 25, 2004 at which time the Claimant reported that he had "quit his job at Bath Iron Works due to stress associated with both his pain and chronic depression. He did not feel that they were being as understanding as they could and did not take his limitations into account." CX 16. Dr.

[3] It appears that Dr. Bergeron had not read Dr. D'Angelo's recommended work restrictions at the time that he wrote his March 3, 2004 Progress Note as he stated, "I do not have Dr. D'Angelo's note yet." CX 6 at 88.

Guernelli noted that the Claimant had not completed the physical therapy program that he had prescribed, and he recommended that the Claimant resume physical therapy and look for sedentary to light duty work. *Id.*

When BIW received the M-1 form from Dr. Guernelli setting forth additional restrictions beyond the 40 pound lifting restriction recommended by Dr. D'Angelo, the matter of which restrictions should prevail were referred to BIW's Chief of Occupational Medicine, Maria Mazorra, M.D. who provided the following opinion:

> The limitations that I would honor are the ones written by Dr. D'Angelo, neurosurgeon. The employee does not get to shop around as to what limits he wants. Furthermore, the surgeon does have greater expertise than the physiatrist.

EX 41 at 48. The Claimant was informed of this determination on April 15, 2004 when he went into BIW's Employee Health Department to discuss his work restrictions. EX 77 at 347.

Dr. Mazorra testified at a post-hearing deposition regarding the Claimant's work restrictions. EX 79. She is board-certified in occupational medicine, and she is an industrial hygienist with a master's degree in public health. *Id.* at 21. Dr. Mazorra testified that she did not examine the Claimant with respect to his lumbar and cervical complaints, but she pointed out that he had been seen for these problems by a nurse practitioner and nurses on her staff. *Id.* at 4-5.[4] Based on her review of the medical records, Dr. Mazorra testified that the Claimant has chronic, intermittent back pain related to degenerative disc disease with a small herniated disc. *Id*. at 6, 9. She also testified that Dr. Pier had placed restrictions on where and in what positions the Claimant could work due to his cervical condition as of April 30, 2003, but she was unsure whether those restrictions continued in effect at the time of her deposition. *Id*. at 10-11. However, she added that the records do not reflect that the Claimant indicated that he had any ongoing neck problems when he was seen in April of 2004. *Id*. at 32. Regarding the differing sets of restrictions from Drs. D'Angelo and Guernelli, Dr. Mazorra testified that she concluded that the Claimant was shopping around for limitations. *Id*. at 12. She explained that she chose Dr. D'Angelo's restrictions over those of Dr. Guernelli because she believed Dr. D'Angelo's opinion to be more authoritative because "a neurosurgeon trumps a physiatrist." *Id.* at 29.[5] Dr.

[4] Dr. Mazorra only examined the Claimant on one occasion in 2002 when he was seen for a non-occupational epididymitis condition. EX 79 at 3-4.

[5] Dr. Mazorra cited 29 C.F.R. § 1904.7 as authority for her decision to credit Dr. D'Angelo's lifting limitation over the more restrictive limitations recommended by Dr. Guernelli. EX 79 at 14-15, 41. While employers obviously must make decisions when confronted with conflicting recommendations on work limitations for an injured employee, the regulation cited by Dr. Mazorra appears inapplicable. Section 1904.7 addresses when an employer is required to record an employee's injury or illness under the Occupational Safety and Health Act. The "authority" specifically relied upon by Dr. Mazorra is found in the Occupational Safety and Health Administration's Recordkeeping Policies and Procedures Manual which in pertinent part states that "[i]f there are conflicting contemporaneous recommendations regarding medical treatment, or the need for days away from work or restricted work activity, *but the medical treatment is not actually provided and no days away from work or days of work restriction have occurred*, the employer my determine which recommendation is the most authoritative and record on that basis." EX 79, Deposition Exhibit 1 at 1-2 (italics added). This guidance is clearly directed to how an injury or illness is recorded, and it does not apply to a situation such as the Claimant's case where medical treatment has been provided and where days of work restriction have occurred.

Mazorra additionally testified that she "has taken issue with" physicians at Medical Rehabilitation Associates in the past because it has been her experience that they use a "standard limit that does not cater to the specifics" of the employee's condition. *Id.* at 19, 27. In this regard, she stated that she has personal knowledge of some individuals with diagnoses of degenerative disc disease of the spine who are working successfully at BIW without limits, while other employees with the same diagnosis require restrictions. *Id.* at 27-28. Although Dr. Mazorra relied on her position that a neurosurgeon is more authoritative than a physiatrist when she approved Dr. D'Angelo's less restrictive limitation, she testified after reading the transcript of Dr. Guernelli's deposition that Dr. Guernelli's negative physical findings supports her belief that his work restrictions are excessive. *Id.* at 30.

Under cross-examination by the Claimant's attorney, Dr. Mazorra insisted that the opinion of a neurosurgeon on work restrictions would always "trump" a physiatrist or family practitioner based on the neurosurgeon's specialty training. *Id.* at 36-38. She said that this is true even though Dr. Guernelli was treating the Claimant for the pain symptoms related to his back condition because Dr. D'Angelo, as a neurosurgeon, has greater expertise with regard to the underlying spine condition. *Id.* at 38-39.

Regarding the Claimant's psychiatric history, the records show that he has been followed by Eliot J. Gruen, M.D. since he was hospitalized for a week during March of 2001 for evaluation of depression and irritability related to anger and inability to get along with both his family and people at work. EX 52 at 195-197.[6] Dr. Gruen's records describe a range of emotional problems including depression, anxiety, explosiveness, poor impulse control, extreme sensitivity to criticism, paranoia and low self-esteem. EX 52. Dr. Gruen has made no recommendation regarding work limitations, though his records reflect that he encouraged the Claimant to continue working. *Id.* Melvyn E. Attfield, Ph.D., a psychologist who evaluated the Claimant for BIW in September and October of 2004, testified that although he did not believe that the Claimant is incapacitated from a psychological point of view, he would recommend that he have "some support in the process of returning to work" in view of his impairment in dealing with people. EX 75 at 21.[7]

C. The Claimant's Resignation from BIW

The Claimant testified that after he learned from BIW that they would not honor the work restrictions outlined on the M-1 form from Dr. Guernelli, he was upset but worked for half a day. TR 37. However, on the following day, April 16, 2004, he said that he went into work and informed Craft Administrator Steve Grant that he was leaving BIW:

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[6] Dr. Gruen's name is followed by M.D. in some reports and by D.O. in others. His *curriculum vitae* is not in the record, so it remains unclear as to whether he is a M.D., a D.O., or both.

[7] The Claimant has not alleged in this proceeding that he is incapacitated from working due to any psychological injury caused or aggravated by work-related stress. TR 12-13.

> I came in the next day and I went to Steve Grant, and I told him, "I'm checking out." I met up with him coming out of the restroom, and I said you know I have limitations. They wouldn't accept my limitations from my doctor I said, but they will accept them from another doctor but not the doctor that was treating me. And I said you guys will give the people and accommodate people who have accidents outside the yard, and you accommodate them. And I have an accident inside the yard, and you can't accommodate me, but you accommodate people outside.

TR 37. The Claimant testified that he quit and was not fired, and he reiterated under cross-examination that he quit because he was upset over BIW's refusal to accept Dr. Guernelli's recommended limitations. TR 48-49.[8] He denied that Mr. Grant had attempted to persuade him not to quit or that Mr. Grant had suggested that he could take time off to deal with his depression. TR 49. Rather, he said that Mr. Grant "wrote me up for lost time" and that he "deserved to be written up" as he had exceeded his allowed time off. TR 49-50. BIW personnel records reflect that the Claimant had a lengthy history of disciplinary warnings for absenteeism including a warning issued on April 15, 2004, apparently in response to the Claimant's actions in leaving work after half a day. EX 66.

The Claimant's account of his reasons for resigning from BIW is consistent with contemporaneous statements that he made to Dr. Gruen, his treating psychiatrist. On March 29, 2004, Dr. Gruen wrote that the Claimant told him that he was having thoughts of quitting, that he felt embarrassed because he cried at work and that he was having more problems with his back and had been out of work for a month. EX 52 at 175. On April 30, 2004, Dr. Gruen reported that the Claimant was going through a difficult time as he had quit his job because his employer would not recognize his severe back pain, causing him to feel rejected. *Id.* at 174.

Mr. Grant, the craft administrator, testified at a deposition taken on February 28, 2005. EX 78. As a craft administrator at BIW, Mr. Grant is responsible for several shipyard trades, including the paint shop and the blasting, insulating, and pipe-covering departments. *Id.* at 3. Although Mr. Grant has known the Claimant for several years – dating back prior to 1998 when Mr. Grant was promoted from a laborer's job into management – he testified that they did not have much interaction. *Id.* at 5-6. He said that on April 15, 2004, the day before the Claimant's separation from BIW, he had a conversation with the Claimant about the latter's decision to resign. *Id*. at 7. Mr. Grant recalled that the Claimant came into his office, possibly to present him with a set of work restrictions, and he "started telling me he had all kinds of personal issues going on, wanted to resign at that moment in time" because his personal issues were building up and "[h]e just couldn't – couldn't take a lot of things anymore." *Id.* at 7-9. Mr. Grant testified that he advised the Claimant to reconsider, and he told the Claimant that BIW's medical department offered counseling services which could address his personal issues. *Id.* at 7-8, 10. The Claimant agreed not to resign that day and returned to work. *Id.* at 8. However, he said that the Claimant came up to him the next day, April 16, 2004, and stated that he had "made up his

[8] It is noted that the Claimant testified at a pre-hearing deposition that his mental state was also a factor in his decision to quit his job at BIW. Specifically, he said that he "had a lot of anxiety just even being around my buddies" at work, that he was "down and out" and felt as though he did not "fit in" and that he was having difficulty dealing with alcoholism and domestic conflicts. EX 57 at 48-49.

mind" and wanted to resign. *Id.* at 11. Mr. Grant said that he then processed the paperwork to reflect that the Claimant resigned for "personal reasons" and escorted the Claimant from the shipyard. *Id.* He denied that the Claimant ever indicated that his resignation was in any way related to BIW's decision not to accommodate his restrictions. *Id.* at 11-12. Moreover, he testified that he would be aware as a craft administrator of any disputes over an injured employee's work restrictions and that he was not aware that there had been any issues concerning the Claimant's limitations or BIW's willingness to accommodate them. *Id.* at 13-14.[9] Mr. Grant also contradicted the Claimant's testimony that the quality assurance work that he was doing at the time of his resignation required him to work in confined spaces or in awkward positions. *Id.* at 15-16. He testified that more than 90 percent of the work was in open compartments where the Claimant could freely move about, and he noted that the Claimant's only restriction was against lifting more than 40 pounds. *Id.* at 20-21. He added that there was no restriction against the Claimant working on ladders or doing overhead work, although he said that he could have accommodated such restrictions if they existed. *Id.* He also said that the Claimant never complained to him about working in confined areas or that he was unable to do assigned work. *Id.* at 17, 21.

The Claimant also discussed his reasons for leaving BIW with Dr. Attfield, the psychologist who evaluated him at BIW's request in September and October of 2004. Dr. Attfield testified at his deposition that the Claimant told him that he believed that Dr. D'Angelo was in collusion with Dr. Mazorra at the BIW Medical Department but that he "felt he was capable of doing his work at Bath Iron Works." *Id.* at 16. The Claimant also reportedly said that he "could work with [Dr. D'Angelo's] limits, but I thought it was wrong." EX 55 at 232A. In his evaluation report, Dr. Attfield wrote that the Claimant stated that after discovering the alleged collusion between Drs. Mazorra and D'Angelo,

> I knew what was coming – I had enough. Couldn't hang in there anymore. I went to work half a day after I left the nurse practitioner – went up – got written up for the last time. Showed limitations to the craft administrator and to the boss. They gave me a job to do. I left after half a day. Came back the next day. I was coming down the stairs – he was going to the candy machine. I said, 'It's all done.' We talked about my depression – he needed to get candy for his diabetes. I had enough. Resigned.

EX 55 at 232.[10] Dr. Attfield also wrote in his report that the Claimant told him he left BIW because he did not like being there and that "[i]t was not the pain that made me resign." *Id.* Regarding the Claimant's articulated reasons for leaving BIW, Dr. Attfield testified,

> He just said that he had enough. And – and it was difficult for me to determine precisely what that was, but I think that part of it – or at least from my understanding in the – in the conversation with Mr. Vallee is that he was

[9] It is noted that this assertion is undercut by the evidence discussed above that Dr. Mazorra had rejected the restrictions that the Claimant had presented from Dr. Guernelli and accused the Claimant of shopping for medical opinions.

[10] Dr. Attfield testified that this was a direct quote that he repeated to the Claimant to make sure it was clear. EX 75 at 17.

> overwhelmed by the domestic things at home and he just didn't want to go into work. It was just too difficult for him to be at work.

EX 75 at 17. Based on the Claimant's history that his emotional symptoms had not resolved by the fall of 2004 when he had been out of work for nearly six months, Dr. Attfield concluded that the Claimant's work at BIW did not 'create" his emotional problems, though he noted that the Claimant reported that his work "aggravated" his depression. *Id.* at 20, 22.

D. Is the Claimant entitled to disability compensation?

The Act defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. § 902(10). A claimant establishes a *prima facie* case of total disability by showing that he is unable to return to his usual employment because of a work-related injury. *Bath Iron Works Corporation v. Preston*, 380 F.3d 597, 608 (1st Cir. 2004) ("*Preston*"), citing *Delay v. Jones Washington Stevedoring Co*., 31 BRBS 197 (1998). I find, and BIW does not dispute, that the Claimant has successfully established that he is unable to return to his usual employment as a shipyard laborer/cleaner because of the limitations resulting from his work-related back and neck injuries. "Once a claimant demonstrates an inability to return to his job because of a work-related injury, he is considered totally disabled within the meaning of [the Act] and the burden shifts to the employer to prove the availability of suitable alternative employment in the claimant's community." *Id., quoting Palombo v. Director, OWCP*, 937 F.2d 70, 71 (2d Cir. 1991). *See also Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45, 48-49 (1997) (holding that the respective burdens placed on a claimant and employer in cases of alleged disability resulting from traumatic injury are not altered by a claimant's alleged voluntary withdrawal from the workforce).

As discussed above, the Claimant contends that he is entitled to two periods of disability compensation: (1) temporary total disability from February 3, 2003 through April 28, 2003 when he was held out of work by Dr. Bergeron because of his back symptoms; and (2) permanent total disability commencing on April 16, 2004 because his inability to twist and bend as a result of his work-related injuries prevents him from performing his usual job as a shipyard laborer/cleaner. BIW has offered no defense to the claim for the closed period of temporary total disability compensation in 2003, but it does raise several challenges to the claim for permanent total disability compensation. I will address each of these defenses in turn.

BIW first contends that the Claimant should not be found to be totally disabled because he resigned even though suitable alternative work had been made available to him. That is, BIW argues that the work restrictions recommended by Dr. D'Angelo, which it accepted and was willing to accommodate, should be credited over the recommendations of Dr. Guernelli in light of Dr. D'Angelo's status as a neurosurgeon. BIW Brief at 16-17. In this regard, it is evident that BIW's task of determining the appropriate work limitations and necessary accommodations for the Claimant was difficult, in part because the Claimant was seen by multiple physicians for separate cervical and lumbar conditions, generating a wide range of sometimes conflicting work limitations, and in part by the Claimant's emotional problems which appear to have impeded effective communications. In terms of the Claimant's limitations resulting from his cervical

condition, I find that the M-1 form completed by Dr. Pier on April 30, 2003 is the most persuasive evidence of the Claimant's neck-related work restrictions at the time that the Claimant left BIW on April 16, 2004. Dr. Pier's recommendations were endorsed by Dr. Desai, the treating neurosurgeon, and they are not contradicted by the opinion of any other physician who evaluated the Claimant's neck. More importantly, Dr. Pier placed no time limitation on his recommendations, and there is no evidence that BIW ever had the Claimant's cervical condition reevaluated to determine whether his work restrictions could be modified.[11] With respect to any additional limitations necessitated by the Claimant's lumbar condition, I find that the weight of evidence supports crediting Dr. Guernelli's more cautious assessment over Dr. D'Angelo's single restriction of a temporary 40 pound lifting limitation. In this regard, I note that Dr. Mujica, another neurosurgeon, recommended permanent work restrictions of no repetitive bending, stooping or twisting in addition to a permanent lifting limit of 50 pounds, although he was apparently dissuaded by the Claimant from putting these recommendations into a M-1 form. I also note that Drs. Bergeron, Mujica and Mazorra all recognized the Claimant's lumbar symptoms as chronic and recurrent. Furthermore, the Claimant experienced an increase in his lower back symptoms in early 2004, subsequent to his evaluation by Dr. Mujica. Taking these facts into consideration, it seems entirely reasonable that a physician would, at least initially, take an even more conservative approach instead of relying, as Dr. D'Angelo apparently did, on the Claimant's recent recovery, a development that surprised Dr. D'Angelo in light of the demands of the Claimant's work and the presence of a ruptured lumbar disc.[12]

For the reasons detailed above, and noting the absence of any explanation from Dr. D'Angelo regarding the rationale behind his recommendation on work restrictions, I credit Dr. Guernelli's opinion as better reasoned and more consistent with the opinions of the Claimant's other treating and examining physicians, Drs. Mujica and Bergeron. Consequently, I find that the Claimant's work-related back and neck injuries imposed the following restrictions in April of 2004: (1) moderate (30 minutes in an hour) overhead and climbing work as outlined by Dr. Pier on April 30, 2003; and (2) no lifting or carrying more than 10 pounds on a regular basis and 20 pounds occasionally with no repetitive bending or twisting at the waist and no prolonged sitting, standing or walking for more than 1 to 2 hours at a time without a change in position or rest period as outlined by Dr. Guernelli on April 2, 2004. Since BIW rejected Dr. Guernelli's recommendations, in addition to overlooking the restrictions previously outlined by Dr. Pier to protect the Claimant from further cervical injury, I find that the work that it offered the Claimant (*i.e.*, laborer/cleaner work subject only to the temporary 40 pound lifting restriction recommended by Dr. D'Angelo) cannot be considered suitable because it was not properly tailored to the Claimant's physical limitations. *See Bumble Bee Seafoods v. Director, OWCP*,

[11] BIW argues that there is no indication in the record that Dr. Pier intended his work restrictions to be permanent and that the absence of evidence of any subsequent cervical complaints from the Claimant and his statement to Dr. Attfield in October of 2004 that he was not in pain indicates that the neck injury had resolved by the time the Claimant resigned on April 16, 2004. BIW Brief at 19. I give little weight to the Claimant's denial of pain six months after he had stopped working, and I find that the more reasonable inference to draw from Dr. Pier's silence on the duration of his work restrictions is that he did not to intend to place any temporal limits, something he could have easily done so by completing the "Effective Until" line which he left blank on the M-1 form. EX 77 at 404.

[12] Dr. Mazorra's conclusion that the Claimant was "shopping" for work restrictions is not supported by the record which shows that he persuaded Dr. Mujica not to give him any limitations and that the Claimant has a tendency to deny pain and limitations.

629 F.2d 1327, 1330 (9th Cir. 1980); *Mason v. Bender Welding & Mach. Co*., 16 BRBS 307, 309 (1984). Because BIW failed to offer suitable alternative work to the Claimant, his refusal to accept the work offered and his "voluntary" resignation on April 16, 2004 is of no legal consequence and does not operate to deprive him of a finding of total disability. *See Hicks v. Pacific Marine and Supply Co., LTD*, 14 BRBS 549, 560-562 (1981) (affirming ALJ finding that a claimant is not required to run the risk of further injury by accepting an offer of work that does not meet injury-related limitations).

BIW next argues that it should not be held responsible for total disability compensation because the evidence establishes that the Claimant's inability to work since April 16, 2004 is attributable to his non-work-related psychological problems. BIW Brief at 17-18. An employer can avoid liability for a worker's disability where the evidence establishes that subsequent to a work-related injury, the worker suffered a second disabling injury as a result of an intervening cause that is not work-related. *Arnold v. Nabors Offshore Drilling, Inc*., 35 BRBS 9, 14-15 (2001), *aff'd mem*., 32 Fed. Appx. 126 (5th Cir. 2002) (table); *Bass v. Broadway Maintenance*, 28 BRBS 11, 15 (1994). Thus, a worker who becomes disabled by a psychological impairment is not entitled to compensation where substantial evidence demonstrates that the psychological condition is not work-related. *Sanders v. Alabama Dry Dock & Shipbuilding Co*., 22 BRBS 340, 342-343 (1989). Here, however, the evidence fails to establish that the Claimant is unable to work due to his psychological condition.

Dr. Gruen, the Claimant's treating psychiatrist since 2001, did not impose any work limitations and, in fact, encouraged the Claimant to continue working. In addition, Dr. Attfield, BIW's expert, expressed the opinion that the Claimant is not psychologically incapacitated from working. Accordingly, I find that the evidence of record does not establish that the Claimant is disabled because of a non-work-related intervening psychological injury. It is noted that Dr. Attfield testified that it was his understanding that the Claimant's decision to resign from BIW in April of 2004 was based in part on his ongoing domestic problems and a feeling that it was "just too difficult for him to be at work." EX 75 at 17. Indeed, the Claimant himself has acknowledged that his emotional state played a role in his decision to resign from BIW. EX 57 at 49-49. However, there also is substantial evidence in the form of the Claimant's credible testimony at the hearing, which is corroborated by the contemporaneous statements that he made to Drs. Gruen, Guernelli and Attfield that he resigned because of his frustration over BIW's refusal to accept his work restrictions. TR 48-49, EX 52 at 174-175.

After much reflection on the entire body of evidence, I conclude that the Claimant resigned from BIW because of both his frustration over BIW's refusal to accept the work limitations from Dr. Guernelli and his emotional state.[13] What this means to his claim for total disability compensation is answered by application of the aggravation doctrine which holds that an employer is liable for the entirety of an injured worker's disability when an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying

[13] The Claimant's account of his reasons for resigning, which I find credible, are at odds with the deposition testimony of Mr. Grant, the craft administrator. In my view, this discrepancy is most likely assignable to the difficulty that the Claimant seems to have in communicating his thoughts to others. This was recognized by Dr. Attfield, and I do not find it surprising that a lay person like Mr. Grant might have had an incomplete appreciation of the Claimant's reasons for resigning when a trained psychologist encountered similar difficulty.

condition. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517 (5th Cir. 1986). *See also Gardner v. Director, OWCP*, 640 F.2d 1385, 1389 (1st Cir. 1981). It is not necessary for the Claimant to establish that his work-related injuries were the dominant factor in his decision to resign because "the relative contributions of the work-related injury and the pre-existing condition are not weighed to determine . . . entitlement." *Johnson v. Ingalls Shipbuilding, Inc*., 22 BRBS 160, 162 (1989). Since the evidence establishes that the Claimant's work-related injuries and his refusal to accept unsuitable work offered by BIW combined with his emotional state to motivate his resignation on April 16, 2004, I conclude that the Claimant's non-occupational psychological condition is not an intervening disabling injury that absolves BIW of liability, but rather that the entire disability is compensable. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 815 (9th Cir. 1966) ("If an employee is incapacitated from earning wages by an employment injury which accelerates a condition which would ultimately have become incapacitating in any event, the employee is incapacitated 'because of' the employment injury, and the resulting 'disability' is compensable under the Act.").

Lastly, BIW contends that the Claimant's work-related conditions have not reached permanency because his cervical condition had resolved by the time of his resignation and because the work restrictions recommended by Dr. D'Angelo were temporary. BIW Brief at 19. BIW correctly points out that no physician has specifically classified any of the Claimant's conditions as permanent, and there is medical evidence that he has experienced some improvement in his symptoms and may reasonably expect to experience additional improvement in the future. "To be considered permanent, a disability need not be 'eternal or everlasting;' it is sufficient that the 'condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.'" *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781 (1st Cir. 1979), *quoting Watson v. Gulf Stevedoring Corp*., 400 F.2d 649, 654 (5th Cir. 1968). The Claimant's back injury dates to 1989, and his neck symptoms originated in 2002. While there has been some waxing and waning in the intensity of his symptoms over the years, he has yet to make a complete recovery, and no physician had identified a time in the future when significant recovery is expected. On these facts, I am persuaded that the Claimant's conditions are appropriately considered to be permanent as they have continued for a significant period of time and appear to be lasting or indefinite in duration. Since the Claimant has not had any medical care since April of 2004, I will fix the date of permanency on April 16, 2004 when he left BIW.

Based on the foregoing, I conclude that the Claimant is entitled to an award of temporary total disability compensation from February 3, 2003 through April 28, 2003 and permanent total disability commencing on April 16, 2004. Section 10 of the LHWCA provides compensation shall be based upon an employee's average weekly wages calculated at the time of injury. 33 U.S.C. § 910; *Hall v. Consolidated Employment Systems, Inc*., 139 F.3d 1025, 1029-1030 (5th Cir. 1998); *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 104 (1991). The Claimant requests that his compensation be based upon average weekly wages of $702.90 which were calculated from his earnings during the 52 weeks preceding his September 24, 1999 injury. Claimant Brief at 10; CX 3 at 29. BIW has not addressed the issue of average weekly wages, but it introduced wage evidence from which the Claimant's average weekly wages were computed pursuant to section 10(a) of the LHWCA for the following dates of injury: December 10, 1992 ($558.53); October 18, 1994 ($574.51); November 14, 1997 ($690.88); September 24, 1999

($702.90); and June 9, 2002 ($416.14). EX 10, 16, 22, 29, 35.[14] The record also shows that BIW voluntarily paid the Claimant disability compensation from January 28, 2004 through March 4, 2004 based upon the $693.27 average weekly wages for the 1997 injury. EX 20, 21. It is unclear why BIW chose that figure or why the Claimant suggests that wages earned in the year prior to the 1999 injury should control. In any event, I find that neither of these alternatives is appropriate. Where, as in this case, a worker suffers successive injuries which individually do not result in any diminution of wage-earning capacity, compensation is based on the average weekly wages as calculated at the time of the most recent injury for which compensation is claimed. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co*., 16 BRBS 190, 193 (1984). *See also Kooley v. Marine Industries Northwest*, 22 BRBS 142, 146-147 (1989). Since the Claimant has not demonstrated any loss of wage-earning capacity as a result of any of his successive work-related injuries prior to June 9, 2002, his compensation must be based on the average weekly wages calculated as of the date of his most recent injury. Using the higher 1999 average weekly wages urged by the Claimant would result in BIW compensating him for economic losses that are not the result of his occupational injuries. Rather, these losses are the likely product of non-compensable factors such as reduction in the amount of available work or time missed due to the Claimant's family and psychological problems for which no claim has been asserted. Therefore, the Claimant's compensation will be based upon his average weekly wages of $416.14 at the time of his most recent compensable injury on June 9, 2002.

E. Is BIW entitled to liability relief from the Special Fund?

BIW seeks relief from its compensation liability pursuant to the Special Fund provisions of Section 8(f) of the LHWCA ("Section 8(f)"). When a disability or death is not due solely to the injury which is the subject of the claim, section 8(f) limits an employer's liability for death benefits to a period of 104 weeks, after which compensation liability is assumed by a Special Fund established pursuant to 33 U.S.C. § 944. 33 U.S.C. § 908(f); *Lawson v. Suwannee Fruit & Steamship Co*., 336 U.S. 198, 200 (1949). In order to "prove that it is entitled to Section 8(f) relief, an employer must show that, (1) the employee had a permanent partial disability that existed prior to the second injury; (2) the second injury contributed to that disability; and (3) the prior disability was 'manifest' to the employer." *Bath Iron Works Corporation v. Director, OWCP*, 136 F.3d 34, 39 (1st Cir. 1998) (internal quotation marks in original) *citing Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74, 76 (1st. Cir. 1992). BIW contends that when it hired the Claimant on December 7, 1987, shortly before it became self-insured for workers' compensation liability on September 1, 1988, the Claimant had a pre-existing permanent partial disability as a result of his psychological conditions. BIW Brief at 21. BIW further contends that it continued to employ the Claimant after his 1989 back injury which has been chronically symptomatic and necessitated work restrictions. *Id.* at 21-22.

With respect to the requirement of a preexisting permanent partial disability, a party seeking liability relief "must show that the disability is serious enough to motivate a cautious employer either not to hire or to fire employee because of the 'greatly increased risk of employment-related accident and compensation liability.'" *CNA Insurance Co. v. Legrow*, 935

[14] The section 10(a) formula applies in cases where the injured employee "worked in the employment in which he was working at the time of the injury . . . during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a). The parties appear to be in agreement that section 10(a) is applicable.

F.2d 430, 435 (1st Cir. 1991), quoting *C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 513 (D.C.Cir.1977). The disability need not be so serious as to have precluded the worker from doing his usual job, but it does have to be a medical *condition*, as opposed to merely an unhealthy behavior such as smoking, and it must have been in existence prior to the work-related injury or disease. *Director, OWCP v. Bath Iron Works Corp*., 129 F.3d 45, 50 (1st Cir. 1997). The Claimant's medical records show that he was hospitalized in 2001 for evaluation of emotional problems related to anger and inability to get along with both his family and people at work and that his treating psychiatrist has described a range of psychological conditions including depression, anxiety, explosiveness, poor impulse control, extreme sensitivity to criticism, paranoia and low self-esteem. While these problems may not have been disabling, aside from the week that the Claimant was hospitalized during 2001, I find that they were sufficiently serious to have motivated an employer to discriminate, especially since the evidence clearly shows that the condition interfered with workplace relationships and interactions. Since the evidence shows that the psychological conditions existed prior to the Claimant's most recent injury of June 9, 2002, I find that BIW has shown that the Claimant has a pre-existing permanent partial disability. I further find that the manifest requirement is satisfied because the Claimant's psychological condition was clearly diagnosed and identified in Dr. Gruen's medical records which were available to BIW. *White v. Bath Iron Works Corp*., 812 F.2d 33, 35 (1st Cir. 1987).

On the other hand, the medical records reflect that the Claimant was seen in BIW's First Aid Department in 1989 and on subsequent occasions with complaints of back pain, but there is no evidence that he received any significant treatment, lost any time from work, or was diagnosed with anything more than temporary strains. EX 41. Accordingly, I find that there is insufficient evidence prior to the most recent injury of June 9, 2002 to have put BIW on notice that the Claimant suffered from such a serious back condition that it would have been motivated to terminate the Claimant in order to eliminate the risk of compensation liability.

In order to satisfy the final requirement for Section 8(f) relief – that the pre-existing condition contribute to the Claimant's disability – BIW must show that the Claimant's permanent total disability is not due solely to the most recent injury. *Director, OWCP v. Bath Iron Works Corp*., 129 F.3d 45, 50 (1st Cir. 1997); *Director, OWCP v. Luccitelli*, 964 F.2d 1303, 1305 (2nd Cir. 1992) (*Luccitelli*) (the Employer "must show, by medical or other evidence, that a claimant's subsequent injury *alone* would not have caused the claimant's total permanent disability." (italics in original)). As discussed above, the evidence establishes that the Claimant's reasons for resigning from BIW on April 16, 2004 were a combination of his refusal to accept BIW's offer of work that did not accommodate his legitimate work restrictions and his fragile emotional condition. However, the evidence supports that even without any contribution from psychological limitations, the Claimant would still be found totally disabled based solely on BIW's failure to establish that there is suitable alternative employment available. Since the Claimant's work injury was enough to totally disable him, it is irrelevant for 8(f) purposes that any pre-existing condition made his total and permanent disability greater. *See Luccitelli,* 964 F.2d at 1306. Consequently, it cannot be said that the Claimant's pre-existing, manifest psychological disability contributed to his permanent total disability. Therefore, BIW's application for liability relief from the Special Fund must be denied.

F. Is BIW liable for medical care provided by Dr. Guernelli?

BIW denies responsibility for the cost of the medical care provided by Dr. Guernelli because the Claimant failed to obtain its prior written consent before initiating treatment with Dr. Guernelli. BIW Brief at 20-21. The Claimant has not addressed this argument which I find meritorious. The LHWCA provides that an injured worker is entitled to an initial free choice of a physician, and once the initial choice of physician is made, a subsequent change of physician may be made only with the prior written approval of the employer, carrier or deputy commissioner. 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406. An employer is not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization unless the claimant shows that he has been effectively refused further treatment. *Slattery Assocs. v. Lloyd*, 725 F.2d 780, 787 (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp*., 14 BRBS 657, 664 (1982). As the Claimant has not shown that he obtained prior written approval or that he was effectively denied further medical treatment before he changed physicians to Dr. Guernelli, I find that BIW is not liable for the cost of Dr. Guernelli's care.

G. Interest and Attorney's Fees

The first installment of compensation under the LHWCA becomes due fourteen days after a claimant gives notice to the employer of an injury or the employer has knowledge of the injury. 33 U.S.C. § 914(b) (2001). The record reflects that BIW had notice of the Claimant's June 9, 2002 injury and the fact that he had lost time from work as a result of this injury by January 7, 2003. EX 30. Since compensation payments were not timely made, I find that the Claimant is entitled to an award of prejudgment interest. *See Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director.

The Claimant is also entitled to an award of attorney's fees under section 28 of the LHWCA because he utilized the services of an attorney in successfully establishing his right to compensation. *See Lebel v. Bath Iron Works Corp.*, 544 F.2d 1112, 1113 (1st Cir. 1976). The Claimant's attorney will be allowed 30 days from the date this decision and order is filed with the OWCP District Director in which to file a fee application as required by 20 C.F.R. § 702.132 (2004), and the Respondent's shall have 15 days from the date of service of any fee application in which to file any objection.

III. Order

Based upon the foregoing Findings of Fact and Conclusions of Law, and upon the entire record, the following compensation order is entered:

(1) Bath Iron Works Corporation as a self-insured employer shall pay to the Claimant Steven M. Vallee temporary total disability compensation pursuant to 33 U.S.C. § 908(b) from February 3, 2003 through April 28, 2003 based on an average weekly wage of $416.14 which

yields a compensation rate of $277.43 per week, plus interest on all past due compensation, computed from the date each payment was originally due until paid, and the appropriate rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director;

(2) Bath Iron Works Corporation as a self-insured employer shall pay to the Claimant Steven M. Vallee permanent total disability compensation pursuant to 33 U.S.C. § 908(a) at the rate of $277.43 per week commencing on April 16, 2004 and continuing until further order, plus the applicable annual adjustments provided in 33 U.S.C. § 910 and interest on all past due compensation, computed from the date each payment was originally due until paid. The appropriate rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director;

(3) The Claimant's attorney shall have 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. § 702.132 (2004), and the Employer and Carrier shall have 15 days from the filing of the fee petition to file any objection; and

(4) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts